ESTATE OF WILLIAM YOUPEE : Order Affirming Decision
:
: Docket No. IBIA 94-124
:
: September 26, 1995

Appellants Williamette Bussard, Helen Youpee-Ricker (Helen) , Allen F. Youpee, D. Dwight Youpee, Isabelle F. Youpee, Josephine Youpee, Dorothy L. LaFromboise, Gretchen Youpee, Cary G. Youpee, and Marvin K. Youpee, Sr., seek review of a May 13, 1994, order denying rehearing issued by Administrative Law Judge Vernon J. Rausch in the estate of William Youpee (decedent), IP TC 176R 91. Judge Rausch's denial of rehearing let stand a March 3, 1994, order determining that Robert Martin (Robert) was decedent's biological son. 1/ For the reasons discussed below, the Board of Indian Appeals (Board) affirms that order.

Decedent, Fort Peck Allottee No. A02152, died on October 19, 1990, as the result of an automobile accident. Judge Rausch held a hearing to probate decedent's trust estate on August 5, 1991. The family history data sheet prepared by the Bureau of Indian Affairs indicated that decedent had been married four times; that he had twelve children with his second wife, Isabelle Weinberger; that two of decedent's children predeceased him; and that he was survived by numerous grandchildren. The data sheet also indicated that decedent and Isabelle had a natural son Arrow Weinberger (Arrow), who was adopted shortly after his birth; and that decedent had a son, Robert, whose mother was Ruby Martin (Ruby). Helen testified that Arrow was Isabelle's son, but not decedent's, and had been adopted by maternal relatives, and disputed the information that decedent was Robert's father. Decedent's will, dated March 5, 1981, was introduced at the hearing.

During the hearing Judge Rausch received a message to call Robert, who was not present at the hearing, although, as a possible heir, he had been notified of it. Over the objection of appellants, the Judge returned the call and, based upon his conversation with Robert, ordered a supplemental hearing to allow Robert an opportunity to present evidence concerning the alleged relationship between decedent and Ruby.

1/ A challenge to the constitutionality of the escheat provision of the Indian Land Consolidation Act (ILCA), 25 U.S.C. § 2206 (1994), as applied to certain property interests in decedent's estate, has already been addressed and is not part of this appeal. See Estate of William Youpee, 22 IBIA 248 (1992). The section was held unconstitutional in Youpee v. Babbitt, No. CV 93-21-BLG-JDS (D. Mont. Mar. 3, 1994); aff'd, No. 94-35415 (9th Cir. Sept. 5, 1995).

Because he concluded that the only issue remaining in dispute was whether or not decedent was Robert's father, and because no party--including Robert--had challenged decedent's will, on April 28, 1992, the Judge approved the will and decreed partial distribution of the estate. Most of the will provided specific devises to family members. Judge Rausch found that some of the devises failed because decedent had otherwise disposed of the property interests during his lifetime, and that others failed under ILCA. See n.1, supra. He ordered distribution of the remaining interests, except as indicated below.

Clause 8 of decedent's will provided: "I give, devise, and bequeath to all of my children, my Allotment 2152, in equal shares, to share and share alike." In his 1992 order, the Judge held that this allotment could not be distributed until Robert's claim had been determined. In addition, Clause 23 provided: "I give, devise, and bequeath to each of my grandchildren one thousand ($1,000.00) dollars which monies are to be taken from trust income in my [Individual Indian Money] account. As this is written those grandchildren are: [11 grandchildren named]." The Judge held that if Robert were able to prove his claim that he was decedent's son, Robert's three sons should each receive $1,000 under this clause.

A supplemental hearing was held on September 21, 1992. Although it is not clear from the record when Ruby died, she was deceased at the time of the supplemental hearing. Most of the individuals testifying for Robert were persons who knew Ruby and/or decedent at or around the time of their alleged relationship. Appellants continued to contest Robert's claim, testifying as to their knowledge of decedent's relationships.

On March 3, 1994, Judge Rausch held that Robert had proven that decedent was his father. The present appeal is taken from this determination.

Appellants first argue that Judge Rausch applied the wrong evidentiary standard when he required Robert to prove his claim by a preponderance of the evidence. Citing Ruff v. Acting Portland Area Director, 11 IBIA 267 (1983), 2/ appellants contend that this Board has required that paternity be shown by clear and convincing evidence.

The Board recently rejected an identical argument in Estate of Emerson Eckiwaudah, 27 IBIA 245, 248-49 (1995), stating:

> Federal precedent controls [Indian probate decisions] regardless of whether the law of a particular state, including the State's evidentiary standards, would yield a different result. In rejecting the application of state law in Ruff, the Board also rejected the application of state evidentiary standards, and Ruff is hereby clarified to show this.
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2/ Dismissed, Ruff v. Watt, No. 8301329 (D. Or. Mar. 16, 1984); aff'd, 770 F.2d 839 (9th Cir. 1985).

> * * * The issue in Ruff was whether an individual was a child of a deceased Klamath Indian for purposes of participating in the distribution of the decedent's share of judgment funds awarded to the Klamath Tribe. The initial decision was made by the Portland Area Director, [Bureau of Indian Affairs], who, being unaccustomed to making quasi-probate decisions, looked to Oregon State law, including the State's clear and convincing evidentiary standard, in finding that paternity had not been proven. When the case reached the Board, it ordered an evidentiary hearing by an Administrative Law Judge, who held that paternity had been shown "by a preponderance of clear and convincing evidence." 11 IBIA at 272. As discussed supra, the Board rejected the application of state law in Ruff. Although the Board did not explicitly reject the use of the clear and convincing evidentiary standard, it also did not endorse it.

In Eckiwaudah, the Board examined all of its prior paternity cases in which the standard of proof was explicitly addressed, and held that, except for one anomalous case, Estate of Ke-I-Ze, or Julian Sandoval, 4 IBIA 115, 82 I.D. 402 (1975), it had consistently applied a preponderance of the evidence standard in determining paternity.

Judge Rausch properly held that Robert was required to prove paternity by a preponderance of the evidence.

Appellants contend that Judge Rausch erred in looking to paternity cases from various states rather than to the decisions of this Board, and that by so doing, he failed to apply the appropriate legal standard. They cite Ruff, inter alia, as showing "the number of principles this Board sets out for establishing paternity" (Opening Brief at 8).

It is not at all clear what appellants mean by this statement, or precisely what "legal standard" they believe Judge Rausch should have applied. Obviously, the more evidence there is as to paternity, including the more different kinds of evidence, the easier the ultimate decision is. It appears possible from the context that appellants believe the Board has held that testimony, unsupported by documentary evidence, is insufficient to support a finding of paternity. This is not the case. For example, in Estate of Jason Crane, 12 IBIA 165 (1984), the Board upheld a paternity determination when the mother's otherwise uncorroborated testimony was supported by a statement of the decedent's sister to the effect that the decedent had told her he was supposed to have a daughter somewhere.

Furthermore, there is documentary evidence of paternity in this case. Robert's birth certificate lists decedent as his father. Appellants contend that, because of an amendment to Montana law regarding birth certificates that took effect approximately four years after Robert's birth, this birth certificate is evidence only of the fact that Robert was born on a certain date. The amendment provides that if the man listed on a birth certificate is not married to the mother, the listing is not evidence of paternity in any proceeding adverse to the interests of the alleged father, and

other identified classes of individuals, if paternity is contested. Mont. Code Ann. § 50-l5-109(4) (1993). Appellants, however, cite nothing to show that the State of Montana has applied this amendment retroactively, or to support their contention that the Board should do so.

There is no evidence in this case as to who provided the information, placed on the birth certificate, that decedent was Robert's father. This fact obviously goes to the weight to be given to the birth certificate. However, the birth certificate exists and is some evidence as to the identity of Robert's father.

Appellants offered Robert's 1962 tribal re-enrollment form as documentary evidence that Ruby did not list decedent as Robert's father. 3/ In his answer brief, Robert states that he was unaware of the requirement for re-enrollment since he was either in school or in military service at the time. The 1962 form shows that it was filed by Ruby on Robert's behalf, and that no information was provided concerning Robert's father. Both sides in this dispute and the Judge speculated on the meaning of this omission, particularly as it related to the determination of Robert's blood quantum.

Re-enrollment was required by Assiniboine and Sioux Tribal Enrollment Ordinance No. 1, a copy of which was included as Exhibit 3 to appellants' opening brief. The Ordinance provides automatic membership for any person born prior to, apparently, November 30, 1960, "who is a lineal descendent of a person whose name appears on" certain basic membership rolls, provided that the applicant is a United States citizen and not enrolled with another tribe (emphasis added). The ordinance does not discuss the determination of the blood quantum of these members.

Tracking the Ordinance, Question 5 on the re-enrollment form asks if the applicant's name appeared on one of the basic membership rolls. Question 6 asks: "[D]oes the name of one of your ancestors appear on any of the basic membership rolls?" (emphasis added). "Yes" is checked for question 6 on Robert's form. Don Martin, Sr., who is identified as Robert's great-grandfather, is listed as that ancestor in response to question 7. There is space in question 7 for the name and relationship of only one ancestor. Page 2 of the form begins with the heading: "TRACE ANCESTRY TO ANCESTOR ON BASIC ROLL" (emphasis and capitalization in original). Information tracing Robert's ancestry back through his mother to his great-grandfather is given.

The form notifying Ruby of action on Robert's re-enrollment application states that the application was approved, but does not include any information concerning the calculation of his blood quantum.

3/ Appellants have not challenged Robert's statements that he was enrolled prior to 1962, with a 17/32 blood quantum. Because Ruby's blood quantum was 7/16, Robert's blood quantum indicates that his father had a 5/8 blood quantum. This is the blood quantum listed for decedent on Robert's birth certificate.

Based on its reading of Enrollment Ordinance No. 1, the re-enrollment form, and the approval notification, the Board cannot conclude that Ruby's failure to list decedent on the form is proof that she did not allege that decedent was Robert's father. Both the Enrollment Ordinance and the re-enrollment form ask only for proof that one ancestor was on a basic membership roll. Robert's maternal great-grandfather was on a basic membership roll. Ruby provided all of the information requested by the form. There is no indication in either the Ordinance or the form that the information provided would be used to redetermine the applicant's blood quantum. The Board declines to draw any conclusions based on Ruby's failure to volunteer information that was not requested by the re-enrollment form.

Appellants contend that the Judge made improper assumptions about why Ruby never sought support from decedent. Despite whatever assumptions the Judge may have made, as Robert notes in his answer brief, he never lived with Ruby, but was instead raised by other relatives. This fact, which was brought out at the hearing, makes it unlikely that Ruby would have had standing to seek any form of child support or other assistance for Robert.

Appellants raise decedent's acknowledgement of Arrow, and failure to acknowledge Robert, as proof that decedent did not accept Robert as his son. Stating that decedent was completely forthright with them, appellants contend that decedent told them about Arrow, so that if he acknowledged Robert as his son, he would have told them about him as well. This alleged candor is brought into question by Helen's testimony at the first hearing that she was unaware of decedent's first marriage and did not know if decedent and his third wife were actually married.

Arrow was adopted and raised by his mother's relatives. Robert was also raised by his mother's relatives, although he was not adopted. It appears that Arrow lived on the reservation, while Robert spent most of his adult life off the reservation. Despite Arrow's physical proximity, appellants have not suggested that he was made part of their family, as they allege Robert would have been had he actually been decedent's son. The Board finds that appellants have not shown through this argument that decedent denied Robert was his son. 4/

The reminder of appellants' arguments attack Judge Rausch's characterization of the testimony, the weight he gave to certain evidence, and his determinations of witness credibility. The Board has consistently held that, where testimony is conflicting, it will normally not disturb a decision based upon findings of witness credibility when the Administrative Law

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4/ Appellants point out that decedent's brother testified that if decedent acknowledged Robert as his son, he would have ensured that Robert was enrolled and otherwise provided for. As has been discussed, Robert was enrolled, apparently originally using decedent's blood quantum. Furthermore, there is no information, especially in Robert's statements, that Robert had been financially deprived. The testimony is not persuasive on the issue of whether decedent considered himself Robert's father.

Judge had an opportunity to hear the witnesses and to observe their demeanor while they testified. See, e.g., Estate of Donald Paul Lafferty, 19 IBIA 90, 93 (1990), and cases cited therein. Cf. Eckiwaudah, in which the Board held that it would review witness credibility determinations de novo when the Judge deciding the case was not the Judge who held the hearing. Appellants clearly disagree with the credibility determinations made by Judge Rausch. They have not, however, presented any argument which inclines the Board to depart from its consistent practice of deferring to an Administrative Law Judge's credibility determinations.

The Board has carefully considered the transcript, the other documents in the probate record, the Judge's decision, and appellants' arguments. It finds no reason to disturb the holding that Robert has proved by a preponderance of the evidence that decedent was his father.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Administrative Law Judge Rausch's May 13, 1994, order denying rehearing is affirmed.

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Kathryn A Lynn
Chief Administrative Judy

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Anita Vogt
Administrative Judge